SEP 8 1954
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 273

INTERNATIONAL ALUMINUM WINDOW CORPORATION, a Florida Corporation; AERO-VENT ALUMINUM WINDOW CORPORATION, a New York Corporation, and CHARLES I. GIRSCHOWITCH, *Petitioners*,

vs.

TITO A. FERRI, *Respondent*.

BRIEF OF RESPONDENT, TITO A. FERRI.

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vs.

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BRIEF OF RESPONDENT, TITO A. FERRI.

STATEMENT OF FACTS.

The case is fully stated in the opinion of the Florida Supreme Court per Mr. Associate Justice Taylor included in the Petition as Appendix C. Also, it has been stated in the Report of the Special Master, the Honorable Roger Edward Davis, which is included in the Petition as Appendix A. A reading of the Florida Supreme Court's Opinion will disclose the inaccuracy of several of the conclu-

sions contained in Petitioners' Statement of Facts. The case was not hurried. Ferri filed his Complaint on December 10, 1951, in the Circuit Court of Dade County, Florida (R. 1). Petitioners answered on January 16, 1952 (R. 22). From thence until the Final Decree of March 13, 1953 (R. 253), the case was tried in the lower Court. The appeal to the Supreme Court of Florida was filed May 8, 1953 (R. 256), and affirmed on April 13, 1954 (See Appendix C of Petition). Nowhere along the line was any Federal question raised, claimed or asserted. In an attempt, now, to confer jurisdiction, it is claimed that a Federal question was inherent, so that the case having been lost by the petitioners after due process, it may now be resurrected, if possible, without it. It was to prevent just such judicial ghosts from haunting litigants and the Court that the rule requires a Federal question to be specially pleaded in the lower Court.

JURISDICTION.

The Petition states that the jurisdiction of the Court is invoked under the Florida Constitution (Declaration of Rights, Section 12), the Supreme Court Rule XIX, subdivision (b) and the Judicial Code, Title 28, U. S. C. A., Section 1257, sub-division (3); also under Article XIV, Section I (Amendment to the Constitution of the United States). Rule XIX (b) deals with the U. S. Courts of Appeal which is not applicable here, nor is jurisdiction conferred on the United States Supreme Court by the Florida Constitution. Furthermore, the Judicial Code cited makes it mandatory that the right, title, privilege or immunity awarded under the Constitution "be specially set up or claimed."

QUESTIONS PRESENTED.

The proper question to be presented to the United States Supreme Court is:

Can petitioners for certiorari to the Supreme Court of Florida invoke the jurisdiction of the United States Supreme Court on an alleged denial of due process of law under Section 1 of the Fourteenth Amendment to the United States Constitution, when they claim such denial of constitutional rights for the first time in their petition for certiorari?

The Manner in Which the Federal Questions Sought to Be Reviewed Were Raised in the State Courts.

Petitioners assert that the Federal questions were raised in the Exceptions to the Special Master's Report (Transcript, pp. 252-253) and in the Assignment of Errors to the Supreme Court (pp. 257-258).

In order that the Court may see that this is not the case, we quote the Exceptions to the Special Master's Report and Assignments of Error to the Supreme Court in full as follows:

"Exceptions to Special Master's Report.

"1. Finding of fact in the last paragraph on page 4 and the continuation of said paragraph on page 5 of the Special Master's Report is contrary to the evidence in that the evidence clearly shows that the defendants made every effort to manufacture and sell the invention, which is the basis of this litigation, and that the failure so to do was brought about solely on account of the non-cooperation of the plaintiff and the inability of the plaintiff and the defendant, Girschowitch to clear the patent through the U. S. Patent Office until late in 1951.

"a. The finding of the questions of law to be settled are erroneous in that the suit is not based on failure of consideration for the agreements but is based solely on the question of constructive fraud and misrepresentation.

"b. The determination of the Special Master in his findings of fact is opposed to the uncontroverted evidence that the defendant, Girschowitch, on numerous occasions made every effort to seek the cooperation of the plaintiff, Ferri, in securing drawings of the patent sufficiently correct to allow the manufacture of the window.

"c. The uncontroverted fact that the delinquency of Ferri extended into a period when aluminum became a prohibited item under Federal regulations.

"d. The uncontroverted fact that during the period from the execution of the contract until the institution of the suit the defendants entered into contracts for the manufacture of the window with substantial manufacturing concerns, but were unable to proceed under said contracts due to the lack of material and lack of proper drawings to be furnished by the plaintiff, Ferri.

"2. Finding of facts is not within the scope of the order of reference in that they go outside of the evidence and are based upon a question of law which is not controverted in this suit and should be stricken.

"3. The Special Master should have found that the plaintiff had failed to prove fraud and misrepresentation and should have recommended that the suit be dismissed.

"4. The conclusions and recommendations of the Special Master are contrary to the law and to the evidence herein and should be set aside.

"The defendants move the court to set aside the findings of fact and conclusions and recommendations

objected to and to make its own findings of fact and conclusions of law upon the evidence reported herein or in the alternative to recommit the cause to the Special Master with instructions to make new findings of fact and conclusions of law; or as the case may be."

"Assignments of Error.

"1. That the Court erred in approving and confirming the Special Master's Report filed by Roger Edward Davis as Special Master on January 28, 1953.

"2. That the Court erred in denying the defendants' exceptions to said Master's Report.

"3. That the Court erred in declaring that the agreement dated May 18, 1946, by and between the plaintiff, Tito A. Ferri, and the defendant, Charles I. Girschowitch, which was admitted in evidence as plaintiff's Exhibit 'A,' a true copy of which is attached to the plaintiff's complaint as Exhibit 'A,' to be null and void and of no effect.

"4. That the Court erred in declaring that the agreement dated June 26, 1946, between the defendant, Charles I. Girschowitch, and the plaintiff, Tito A. Ferri, and the defendant, International Aluminum Window Corporation, which was introduced in evidence as plaintiff's Exhibit 'B,' a true copy of which is attached to plaintiff's complaint as Exhibit 'B,' to be null and void and of no effect.

"5. That the Court erred in declaring that the agreement dated June 17, 1949, between the defendant, Charles I. Girschowitch, and the plaintiff, Tito A. Ferri, and the defendant International Aluminum Window Corporation, and the defendant, Aero-Vent Aluminum Window Corporation, which was introduced in evidence as plaintiff's Exhibit 'C,' a true copy of which is attached to plaintiff's complaint as Exhibit 'C,' to be null and void and of no effect.

"6. That the Court erred in declaring that the plaintiff, Tito A. Ferri, was the sole and exclusive owner of that certain patent for a new and useful improvement in 'WINDOW STRUCTURE,' which was issued by the United States Patent Office at Washington, D. C., on May 8, 1951, by the Honorable John A. Marzall, Commissioner of Patents, and bearing No. 2551590, said patent being issued in the names of Tito A. Ferri, of Miami, Florida, and Charles I. Girschowitch.

"7. That the court erred in allowing the Special Master a fee of $750.00; and that the Court erred in taxing the cost of the proceedings set at the sum of $940.73 equally between the plaintiff, Tito A. Ferri, and the defendants, International Aluminum Window Corporation, Aero-Vent Aluminum Window Corporation, and Charles I. Girschowitch.

"8. That the Court erred in entering its final decree dated the 13th day of March, 1953, and recorded in the Minutes of the Circuit Court in Book 1071, page 186."

The Petition states (page 5) that the Federal question "* * * did not arise until subsequent to the action of the Florida Supreme Court, but was inherent in its decision. Similarly, the issue was likewise inherent when the case was before the Special Master (*Saunders* v. *Shaw et al.*, 244 U. S. 317, 320)."

This statement is self-contradictory. If the Federal question was inherent in the Master's Report, surely it could have been stated in the Exceptions to the Master's Report so that the trial Chancellor might have considered it. Obviously, if it were inherent in the Master's Report, it arose prior and not subsequent to the Supreme Court of Florida's Decision. Furthermore, *Saunders* v. *Shaw, supra,* cited to justify this unusual statement, is not applicable

here. In the *Saunders* case, Mr. Justice Holmes, in speaking for the Court, pointed out the intervening defendant had his case decided against him without ever having had the opportunity to present his evidence. The reason probably was that the Supreme Court of Louisiana thought that the evidence could not be controverted and that the case came within the purview of the United States Supreme Court case which had been decided after the appeal and that to remand the case in order that the defendant could take his testimony would be a concession to technicality. In the language of Mr. Justice Holmes, "It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." Of course, it is obvious that the situation in the *Saunders* case did not and could not exist in this case, as petitioners had all the chance they wanted to put in their evidence and to assert any claim they desired. Moreover, the Supreme Court of Louisiana's attention was directed to the Federal question involved.

REASONS FOR DENYING WRIT.

There was no Federal question raised or asserted in either the Circuit Court of Dade County, Florida, where the case originated or in the Supreme Court of Florida where the case was terminated. Therefore, the United States Supreme Court is without jurisdiction to review this case by certiorari. In *Waters-Pierce Oil Co.* v. *Texas*, 29 S. Ct. 220, 53 L. Ed. 417, 212 U. S. 86, at page 97, the Supreme Court of the United States, speaking through Mr. Justice Day said:

> "The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities, and privileges of Federal origin, specially set up in the state court, and denied by the rulings and judgment of that court. U. S. Rev. Stat., §709, U. S. Comp. Stat. 1901, p. 575. Nor does this court sit to review the finding of facts made in the state court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. *Quinby* v. *Boyd*, 128 U. S. 489, 32 L. Ed. 503, 9 Sup. Ct. Rep. 147; *Egan* v. *Hart*, 165 U. S. 188, 41 L. Ed. 680, 17 Sup. Ct. Rep. 300; *Downer* v. *Richards*, 151 U. S. 658, 38 L. Ed. 305, 14 Sup. Ct. Rep. 452; *Thayer* v. *Spratt*, 189 U. S. 346, 47 L. Ed. 845, 23 Sup. Ct. Rep. 576. * * *"

In *Southwestern Bell Telephone Co.* v. *State of Oklahoma*, 58 S. Ct. 528, 82 L. Ed. 751, 303 U. S. 206, at 212, the Supreme Court of the United States said:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard*, 127 U. S. 216, 234, 32 L. Ed. 125, 132, 8 S. Ct. 1053; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307, 34 L. Ed. 683, 686, 11 S. Ct. 111; *Walter A. Wood Mowing & Reaping Mach. Co.* v. *Skinner*, 139 U. S. 293, 295, 297, 35 L. Ed. 193-195, 11 S. Ct. 528; *Whitney* v. *California*, 274 U. S. 357, 360, 361, 71 L. Ed. 1095, 1099, 1100, 47

S. Ct. 641; *Lynch* v. *New York*, 293 U. S. 52, 54, 79 L. Ed. 191, 192, 55 S. Ct. 16."

It is settled by the decisions of the Supreme Court of the United States that to give the United States Supreme Court jurisdiction from a final judgment of a state court it must affirmatively appear from the record that a Federal question was raised in the state court, that its decision of the Federal question was necessary to the determination of the cause and that the Federal question was actually decided or that the judgment could not have been given without deciding it. *Lynch* v. *People of New York ex rel. Pierson*, 55 S. Ct. 16, 79 L. Ed. 191, 293 U. S. 52, at page 56. In this case, Mr. Justice Hughes, speaking for the United States Supreme Court on this matter, said:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. * * *"

CONCLUSION.

No Federal question ever having been raised in any State courts below, the Petition for Certiorari should be denied. We do not agree with, nor admit for a moment, that the Petitioners were the aggrieved parties in their transaction with the Respondent, Ferri. Quite to the contrary, we have claimed in the appropriate forums that the Respondent, Ferri, was the party who has suffered from the conduct of the Petitioners and our contention has been affirmed by all the State courts. The Petition is nothing

more than an endeavor to inject the Federal question for the first time in the United States Supreme Court where none had previously existed or been asserted.

Respectfully submitted,

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